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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1966

No. .....

CLYDE B. ROGERS, BETTY J. ROGERS, JOHN L. LEMSTER, and as a class, all persons similarly situated, and THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF ARAPAHOE,

Appellants,

vs.

THE CITY AND COUNTY OF DENVER, a municipal corporation; and THE CHERRY CREEK SCHOOL DISTRICT NO. 5 in the County of Arapahoe and State of Colorado,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF COLORADO

JURISDICTIONAL STATEMENT

INTRODUCTORY PARAGRAPH

Appellants appeal from the judgment and order of the Supreme Court of the State of Colorado initially made and entered October 31, 1966, and made final by denial of Petition for Rehearing on November 21, 1966, which decision affirmed the decision of the District Court of Arapahoe County, Colorado, by which decision the annexa-

tion of a portion of the unincorporated area of Arapahoe County to the City and County of Denver was confirmed.

This Statement is respectfully submitted to show that the Supreme Court of the United States has jurisdiction of this appeal and that substantial questions are presented.

OPINIONS BELOW

The opinion and judgment of the Supreme Court of the State of Colorado dated October 31, 1966, is reported at 419 P.2d 648 and appears herein as Appendix A, as is the notation denying Appellants' Petition For Rehearing.

The opinion of the District Court in and for the County of Arapahoe and State of Colorado dated September 2, 1965, has not been reported and appears herein as Appendix B.

JURISDICTION

The opinion and judgment of the Supreme Court of Colorado was dated and entered October 31, 1966, and rehearing was denied November 21, 1966. Notice of Appeal was filed with that Court on December 19, 1966. The purpose of this appeal is to reverse and set aside the judgment of the Supreme Court of the State of Colorado, which judgment upheld the opinion and judgment of the District Court in and for the County of Arapahoe and State of Colorado, dismissing the Complaint of the Appellants and thereby upholding the constitutionality, under the Colorado and the United States Constitutions, of the annexation laws of the State of Colorado, Colorado Revised Statutes (C.R.S.), 1963, Sections 139-10-8, 139-10-3(1) and 139-10-4(2), and holding that the issue of violation of rights under the Federal Constitution could not be properly raised in said action. The jurisdiction of this Honorable Court is invoked under Title 28, United States Code, Section 1257(2). The following cases sustain the jurisdiction of the Supreme Court to review the judgment under direct appeal in this case:

Hunter v. Pittsburgh, 207 U.S. 161, 176
Lucas v. Forty-Fourth General Assembly, 377 U.S. 713, 736

QUESTIONS PRESENTED

1. Whether the State of Colorado, in an area in which the State has discretionary powers, may legislate in such manner as to create unreasonably arbitrary and discriminatory classifications between citizens affected by such legislation, thus violating the due process and equal protection clauses of the United States Constitution.

2. Whether Colorado Revised Statutes (C.R.S.), 1963, Section 139-10-8, as applied to Sections 139-10-3(1) and 139-10-4(2), as applied in this case created an unreasonably arbitrary and discriminatory classification as to those entitled to petition for annexation and counterpetition, (and thus force an election), based upon a required liability for taxes in the next *preceding* calendar year from that in which a petition for annexation is presented, notwithstanding all parties of both classifications reside in the area which is the subject of the petition in the year and at the time the petition is presented and are liable for taxes in the area concerned for that year.

STATUTES INVOLVED

This appeal involves the validity of the annexation laws of the State of Colorado, C.R.S., 1963, Section 139-10-8, as applied to Sections 139-10-3(1) and 139-10-4(2), as hereinafter set forth. Said Statutes may be found in C.R.S., 1963, Volume 7, at page 207 et seq., however, they are incorporated herein as Appendices C-2, C-3 (with police power clause as originally adopted), C-4 and C-5, as is the provision of the Federal Constitution which is involved in this appeal, Appendix C-1.

STATEMENT OF THE CASE

Preliminary Statement

Appellants, in their original pleadings in the District

Court in and for the County of Arapahoe and State of Colorado, initially challenged the constitutionality under both the Federal and State Constitutions and statutes pertaining to annexations as between political subdivisions of the State of Colorado. The question of such constitutionality was pasesd upon by the aforesaid Court of first instance in its opinion of September 2, 1965, by the following language quoted from that opinion:

> "The Court finds that there is a presumption of constitutionality of the statute and that its provisions do not provide an unreasonably arbitrary and discriminatory classification; further, that the issue of violation of rights under the Federal Constitution may not properly be raised under this fact situation; that there is no violation of rights under the Constitution of the State of Colorado; that the State has plenary powers in regard to municipal corporations and counties; that the definitions involved in the statute under question are solely a matter for determination by the General Assembly; and that aggrieved persons must seek relief from the legislative branch of the government rather than from the judicial branch." (See Record, f. 79.)

In the appellate court, i.e., the Supreme Court of the State of Colorado, the Appellants raised the Federal question sought to be reviewed in the Assignments of Error (Argument) set forth in their opening Brief (see Record, f. 148), [and in Petition For Rehearing, (see Record, ff. 160 through 163)], and other than paraphrasing a text (Rhyne *Municipal Law*) and citing a paragraph from 37 American Jurisprudence at page 468, the appellate court did not rule on the assertion of the Appellants that their rights contained under the Federal Constitution were violated by the Statutes of Colorado which was asserted in the original pleadings, (Record ff. 5 through 11), and the appeal, (see Record f. 148).

Background

On December 31, 1964, petitions for annexation to Denver of certain real property located in Arapahoe

County, were filed with the City Council of the City and County of Denver. The petitions (see Record ff. 171 through 174) were signed by Golden Key Manor Homes, Inc. (by Michael K. Cooper, President, and Harvey B. Alpert, Secretary), Mahzel Investment Company (by Michael K. Cooper, President, and Harvey B. Alpert, Secretary), Good Shepherd Home (by Sister Mary Charity, President, and Sister Mary Immaculate Heart, Secretary), Harvey B. Alpert, Sheri Alpert, Michael K. Cooper, and Bette L. Cooper.

On December 31, 1964, the date on which the petitions were filed, there were 66 record owners of portions of the aforesaid real property, including joint tenants, plus the County of Arapahoe.

On February 19, 1965, within the time permitted by statute for the filing of counter-petitions opposing annexation, there was filed with the City Council of the City and County of Denver, a counter-petition opposing annexation of the aforedescribed real property. This is the statutory procedure for initiating an election on the issue of annexation. The counter-petition (see Record f. 175) was signed by The Cherry Creek Gun Club, Inc., Mildred Reese, and Robert Reese who were owners of portions of the real property, sought to be annexed on date of the counter-petition and also as of December 31, 1963, and by 26 other resident owners of portions of said real property (including the individually named Appellants herein) as of December 31, 1964, the date of the filing of the petition.

No election was permitted, since none of the people who signed the counter-petition (except The Cherry Creek Gun Club, Inc. and Mildred and Robert Reese) were allegedly eligible to sign such a counter-petition, isasmuch as they did not possess the statutory tenure required by C.R.S., 1963, Sections 139-10-3(1), 139-10-4(2), and 139-10-8. In order to have been eligible they would have to have been "owners in fee of real property in the territory proposed to be annexed who have in the next preceding calendar year (to the date of the *petition*, i.e., 1963), become liable for a property tax thereon." The ineligible counter-peti-

tioners all purchased their property during 1964 prior to the filing of the petition.

The City Council of the City and County of Denver, thereafter by Ordinance No. 57, Series 1965, effective March 20, 1965, passed an ordinance of annexation whereby the aforesaid property was purportedly annexed to the City and County of Denver. This action was commenced on March 22, 1965.

Complaint Raising Constitutional Issues

In the Complaint in the District Court In And For The County of Arapahoe and State of Colorado, see Record ff. 5 through 11), the issue of violation of rights guaranteed by the 14th Amendment to the United States Constitution was among the issues raised (specifically, see Record ff. 5 and 6).

District Court Action

On September 2, 1965, the District Court in and for the County of Arapahoe and State of Colorado (Appendix B) entered its opinion in which it stated that "there is a presumption of constitutionality of the statute and that its provisions do not provide an unreasonably arbitrary and discriminatory classification; further, that the issue of violation of rights under the Federal Constitution may not properly be raised under this fact situation; etc."

Colorado Supreme Court Action

The Supreme Court of the State of Colorado affirmed the Judgment of the District Court by opinion dated October 31, 1966, (Appendix A), and denied rehearing on November 21, 1966.

THE QUESTIONS ARE SUBSTANTIAL

The issue of law involved in this appeal is substantial in that the opinion below as undisturbed establishes a precedent for continued imposition by the State of an invidious discrimination without "the limitations imposed by our constitutional law upon the action of governments

both state and national, .. essential to the preservation of our public and private rights." (Footnote: Constitution of the United States, Annotated, 1964 Edition, page 1084).

This Honorable Court stated in *Gomillion v. Lightfoot*, 364 U.S. 339, that it has "never acknowledged that the States have power to do as they will with municipal corporations regardless of consequences. Legislative control of municipalities, no less than other state power, lies within the scope of relevant limitations imposed by the United States Constitution."

It is not contended by the Appellants that the legislation complained of is merely unconstitutional, improvident, or an abuse of discretion by the Legislature, but rather that upon its merits it represents an unconstitutional deprivation of guaranteed rights against unreasonably arbitrary and discriminatory classifications, an invidious discrimination in the conduct of the State Legislature violating the due process and equal protection clauses of the United States Constitution. This situation is one more to be likened to that of the Court's more recently expressed philosophy that a constitutional power cannot be used by way of condition to attain an unconstitutional result or in an unconstitutional manner than to the former blanket authority given to State Legislatures over matters within their sole discretion as expressed in *Munn v. Illinois*, 94 U.S. 113 (1876).

It is the belief and urging of the Appellants that changed conditions of today and the changed philosophy of the applicability of the 14th Amendment requires a re-examination of the area which is the subject of this case, last discussed by this Honorable Court in 1907 in the case of *Hunter v. Pittsburgh*, supra. Specific note is called to the decision of this Honorable Court in *Lucas v. Forty-Fourth General Assembly*, supra, in which, together with other cases in the area of apportionment of State legislature, this Honorable Court for the first time intruded into an area theretofore thought to be subject solely to the discretion of the States. Another example is the decision of this Honorable Court in the case of *Gomillion v. Lightfoot*, supra.

In the case of *Hunter v. Pittsburgh,* supra, Mr. Justice Moody held that the plaintiffs in error having raised the issue of violation of the Constitution of the United States, the questions raised by denial of such claims was "*not* so unconstitutional and devoid of all color or merit" . . . that the case should be dismissed "without consideration of their merits".

The assignments of error which were considered and ruled upon by the Court in that case in 1907 would *differ* from the instant case in that in *Hunter* the appeal was based upon allegations involving constitutional rights between the States and its political subdivisions and the citizens thereof. In the instant case no right to vote or even petition or counter-petition was granted to the overwhelming majority of the citizens of the area concerned, including the individual Appellants, due to the unreasonably arbitrary classification constituting an invidious discriminaton by the challenged statutes. Thus the issues here can differ considerably from those raised by *Hunter.* Here the Appellants do not base their appeal on any right or contract with the State, but solely on the ground that the State, in carrying out its discretionary powers, has done so in a manner constituting an invidious discrimination.

It is of interest to note that in the instant case, the petitioners for annexation to Denver were the developers of a subdivision within the area annexed, acting in their capacities as officers of two corporations and as individuals. There was only one other party to the Petition for Annexation, namely, a convent which shortly thereafter successfully sought a favorable rezoning of its otherwise unfavorably zoned pre-existing location within the City and County of Denver. The counter-petitioners, (whose counter-petition was deemed ineffective under the challenged statutes), were persons, except for two, who had purchased homes from the aforesaid developers in 1964, but, not having been liable for taxes in "the next preceding calendar year," (C.R.S., 1963, Section 139-10-8), were not considered "landowners" entitled to counter-petition and thus force the matter to an election. Had the Petition for Annexation been filed one day later, i.e., on January 1,

1965, rather than on December 31, 1964, the residents of the area concerned, who purchased homes from the aforesaid developers during 1964, would not have been denied a voice in the matter. Under the circumstances one must certainly consider the motives of the developers in filing their Petition for Annexation on December 31, 1964.

The Colorado statutory definition of "landowner" as described in and for the purpose of the subject annexation statutes is obviously a definition which favors one group of property owners, (i.e., subdivision developers), over another, (purchasers of homes from said developers). The statute thus confers power on some property holders to virtually control and dispose of the property rights of others solely in their own interest, or even capriciously; a situation declared improper by this Honorable Court in *Eubank v. Richmond,* 226 U.S. 137.

This same philosophy, expressed in *Eubank,* supra, was expressed by the Supreme Court of Oregon in 1927 in the case of *In Re Oregon Tunnel Dist. No. 1,* 253 Pac. 1, in which it was held that a state statute conferring the right to vote on a tunnel district to some while disenfranchising other property owners to be affected was a violation of the rights of the disenfranchised property owners as guaranteed by the 14th Amendment to the United States Constitution. This is the argument of the Appellants here. (See also *McCabe v. Atchison, etc., R. Co.,* 235 U.S. 151.)

It should be further noted that the offending definition of "landowner" in C.R.S., 1963, Section 139-10-8, was, at the time of its adoption, an apparent exercise of the police power of the State as evidenced by the Safety Clause in the 1957 Session Law (adoption of the definition section), wherein the following statement appears:

> "The General Assembly hereby finds, determines and declares that this act is necessary for the immediate preservation of the public peace, health and safety."

It should be respectfully called to the Court's attention that the original definition of this Section, when adopted in 1957, was "139-11-8", the numerical designation of the same Section prior to the statutory revision in 1963. This

was the same basis for passage of the Statutes complained of in the *Eubank* and *Oregon Tunnel Dist.* cases, supra.

Respectfully submitted this 20th day of January, 1967.

HARRY L. ARKIN
1310 Western Federal Savings Bldg.
Denver, Colorado 80202
Attorney for Appellants

CERTIFICATE OF SERVICE

I, Harry L. Arkin, of Denver, Colorado, being a member of the bar of the Supreme Court of the United States, hereby certify that I have served the foregoing Jurisdictional Statement upon The City and County of Denver, being the only adverse party involved herein, by depositing a true and correct copy thereof in a United States post office mail box with first class postage prepaid, addressed to its counsel of record, City Attorney, Attention: Mr. Thomas G. Roche, City and County Building, Denver, Colorado 80202, on this 20th day of January, 1967.

Harry L. Arkin

APPENDIX A

SUPREME COURT DECISION

No. 22005

CLYDE B. ROGERS, BETTY J. ROGERS, JOHN L. LEMSTER, and as a class, all persons similary situated, and THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF ARAPAHOE,

Plaintiffs in Error,

v.

THE CITY AND COUNTY OF DENVER, a Municipal corporation, and THE CHERRY CREEK SCHOOL DISTRICT No. 5 in the County of Arapahoe and State of Colorado,

Defendants in Error.

Error to the District Court of Arapahoe County

Honorable Marvin W. Foote, Judge

EN BANC JUDGMENT AFFIRMED

Harry L. Arkin,

Attorney for Plaintiffs in Error.

Max P. Zall, City Attorney, Thomas G. Roche, Assistant,

Attorneys for Defendant in Error, City and County of Denver.

MR. JUSTICE McWILLIAMS DELIVERED THE OPINION OF THE COURT.

This writ of error concerns the annexation by the City and County of Denver of certain land situate in the County of Arapahoe.

C.R.S. 1963, 139-10-8, which was repealed by the General Assembly in 1965, provided, in part, as follows:

> "*Landowner defined.*—For the purposes of this article "landowners," as used in section 139-10-3, shall mean owners in fee of real property in the territory proposed to be annexed who have in the next preceding calendar year become liable for a property tax thereon;..."

In the instant case, pursuant to C.R.S. 1963, 139-10-3, the petition seeking annexation was filed on December 31, 1964 with the city council of the City and County of Denver. Rogers, and others similarly situated, thereafter signed a counterpetition. However, this counterpetition failed to force an election, as provided for by C.R.S. 1963, 139-10-4, because of the inability of the opponents to this annexation to obtain the required number of signatures. This was so because the signatures of Rogers, and certain others who were similarly situated, were rejected by the city council of the City and County of Denver. These particular signatures were rejected because though these signers as of December 31, 1964 resided in the area sought to be annexed, all had apparently purchased their property during the calendar year of 1964 and therefore were not liable for, nor had they paid, any property tax for 1963, which was the year "next preceding" the year in which the petition was filed.

It was in this circumstance, then, that Rogers, for himself and others similarly situated, and the Board of County Commissioners for Arapahoe County brought an action against the City and County of Denver, challenging the annexation on the sole grounds that the aforementioned statutory definition of "landowners" is unconstitutional in that it is said to violate both the state and federal constitutions. Rogers claims the statutory definition is "unreasonably arbitrary" and constitutes "discriminatory classification." Also, this definition is said to be at odds with the due process and equal protection clauses of the United States Constitution.

Trial of this matter was to the court upon an agreed

statement of facts, and it culminated in a determination by the trial court that the annexation should *not* be voided and on the contrary that the complaint should be dismissed. Rogers now seeks a reversal of the judgment of dismissal thus entered by the trial court.

The general rule is that, in the absence of express constitutional provisions to the contrary, the power of a state legislature over the boundaries of the municipalities of the state is plenary. In this vein, 37 Am. Jur. at page 648 reads as follows:

> "*Consent of Inhabitants.*—It is well settled that the legislature may not only originally fix the boundaries or limits of a municipal corporation, but, subject to constitutional restriction, may subsequently annex, or authorize the annexation of, contiguous or other territory without the consent or even against the remonstrance of persons residing therein. The legislature may, however, and usually does, provide for such consent as a condition of annexation. *Inasmuch as the legislature may provide for the annexation of territory to municipal corporations without the consent of the inhabitants of the annexed territory, the inhabitants cannot complain of any limitations upon their ability to express their disapproval if the legislature sees fit to make the statute conditional upon its acceptance by the affected territory.* Thus, if the annexation of a small municipal corporation to a large one is made conditional upon its acceptance by a majority of the voters of the two municipal corporations taken together, the citizens of the smaller one cannot complain, although their vote is overpowered by that of the larger one; nor is it any ground for objection that the right to vote upon the acceptance of the act is limited to the taxpaying electors of the territory which it is sought to annex, or, still less, that it is left to those possessing the suffrage at general elections, so that owners of taxable property in the annexed district having no right to vote, such as nonresidents and corporations, have no voice in the matter. . . ." (Emphasis supplied.)

See, also, in the same general regard, Rhyne, *Municipal Law,* where at page 37 it is said that, absent constitutional restrictions, the several state legislatures enjoy "unlimited powers" over the annexation of territory by municipalities and may place "any requirement or condition thereon."

Colorado would appear to be in accord with the aforementioned general rule. See *Mayor v. Shattuck,* 19 Colo. 104, 34 Pac. 947. In that case this court recognized that "in general" the legislature has plenary power in respect to municipal corporations and accordingly upheld a statute limiting and restricting annexation elections to "tax-paying electors," as opposed to electors who paid no real property tax. In thus holding, we said that in the absence of a specific constitutional provision to the contrary, the legislature may choose any "appropriate agency whereby to change, modify or disincorporate municipal corporations."

Application of the foregoing principles to the facts stipulated to in the instant case leads us to the definite conclusion that the trial court acted quite properly in its disposition of the controversy.

The judgment is therefore affirmed.

Mr. Justice Day not participating.

APPENDIX B

DISTRICT COURT DECISION

IN THE DISTRICT COURT IN AND FOR THE
COUNTY OF ARAPAHOE AND
STATE OF COLORADO
Civil Action No. 21941

CLYDE B. ROGERS, BETTY J. ROGERS, JOHN L. LEMSTER, and as a class, all persons similarly situated, and THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF ARAPAHOE, Plaintiffs,	
vs.	JUDGMENT
THE CITY AND COUNTY OF DENVER, a municipal corporation; and THE CHERRY CREEK SCHOOL DISTRICT No. 5 in the County of Arapahoe and State of Colorado, Defendants.	

This matter having come on regularly for trial to the Court on August 18, 1965; Plaintiffs being represented by Harry L. Arkin, Esq.; the Defendant City and County of Denver, by Thomas G. Roche, Esq.; and the Defendant Cherry Creek School District No. 5 by Richard L. Banta, Jr., Esq.; the Board of County Commissioners of the County of Arapahoe being given leave to intervene, and it also being represented by Harry L. Arkin, Esq.; the matter having been submitted to the Court on stipulation of facts, the Court having reviewed the stipulation, heard certain testimony, and having been furnished briefs, now rules as follows:

FINDINGS OF FACT

The Court adopts the stipulation of counsel, which is set out hereafter:

1. That the Plaintiffs all have interests in and to the property described in paragraph 3 of the Plaintiffs' Complaint filed in this action, and that there is no dispute regarding the fact that the Plaintiffs have standing and are persons to whom the provisions of Colorado Revised Statutes, 1963, 139-10-6, apply.

2. That on December 31, 1963, the record owners of the aforesaid real property, located in Arapahoe County, not including utility easements, were the County of Arapahoe, Golden Key Manor Homes, Inc., Mahzel Investment Company, Good Shepherd Home, The Cherry Creek Gun Club, Inc., Mildred Reese and Robert Reese.

3. That on December 31, 1964, there was filed with the City Council of the City and County of Denver, petitions for annexation to Denver of the aforesaid real property, which petitions were signed by Golden Key Manor Homes, Inc. (by Michael K. Cooper, President, and Harvey B. Alpert, Secretary), Mahzel Investment Company (by Michael K. Cooper, President, and Harvey B. Alpert, Secretary), Harvey B. Alpert, Sheri Alpert, Michael K. Cooper, Bette L. Cooper, Good Shepherd Home (by Sister Mary Charity, President, and Sister Mary Immaculate Heart, Secretary).

4. That on December 31, 1964, there were sixty-six owners of portions of the aforesaid real property, including joint tenants, plus the County of Arapahoe.

5. That on February 19, 1965, within the time permitted by statute for the filing of counter-petitions opposing annexation, there was filed with the City Council of the City and County of Denver a counter-petition opposing annexation of the aforedescribed real property, and being the procedure for initiating an election on the issue of annexation pursuant to statute; which counter-petition was signed by The Cherry Creek Gun Club, Inc., Mildred and Robert Reese, owner of portions of said real property as of said date and as of December 31, 1963, and twenty-six other owners of portions of said real property as of December 31, 1964, including the indiyidually named Plaintiffs in this action.

6. That pursuant to Colorado Revised Statutes, 1963, Chapter 139, Article 10, Sections 4, 3, and 8, the persons who executed the aforesaid counter-petition (except for The Cherry Creek Gun Club, Inc., and Mildred and Robert Reese) were not eligible to sign such counter-petition, inasmuch as they did not possess the statutory requirements of having been "owners in fee of real property in the territory proposed to be annexed who have in the next preceding calendar year (to the date of the *Petition*, i.e., 1963) become liable for a property tax thereon."

7. That no election was held with respect to the annexation to the City and County of Denver of the subject real property.

8. That the City Council of the City and County of Denver, by Ordinance No. 57, Series 1965, effective March 20, 1965, passed an ordinance of annexation whereby the aforesaid real property was purportedly annexed to the City and County of Denver and from the County of Arapahoe; and within ninety days thereafter this suit was brought.

9. That the aforesaid real property was, at all times prior to the effective date of the aforesaid ordinance, a part of the area included within The Cherry Creek School District No. 5; that the question of whether the aforesaid real property is now a part of the area included within The Cherry Creek School District No. 5 is reserved for determination by the Court.

This latter issue now is resolved adversely to Plaintiffs. There was further presented to the Court the issue of whether or not the Cherry Creek School District No. 5 could charge tuition for those students the Court permitted to remain in the District until the end of the school year 1964-1965.

CONCLUSIONS OF LAW

The Court finds that there is a presumption of constitutionality of the statute and that its provisions do not provide an unreasonably arbitrary and discriminatory classification; further, that the issue of violation of rights

under the Federal Constitution may not properly be raised under this fact situation; that there is no violation of rights under the Constitution of the State of Colorado; that the State has plenary powers in regard to municipal corporations and counties; that the definitions involved in the statute under question are solely a matter for determination by the General Assembly; and that aggrieved persons must seek relief from the legislative branch of the government rather than from the judicial branch.

The Court further finds that the Board of Education of Cherry Creek School District No. 5 is entitled to charge tuition for students from outside the school district; however, under the circumstances of the instant case such tuition ought not to be charged for those students who remained in the Cherry Creek School District until the end of the school year 1964-1965, for to make such charge during the time this action was pending would be unconscionable.

It is therefore ORDERED, ADJUDGED AND DECREED that the relief prayed for by the Plaintiffs against the Defendant City and County of Denver be denied, that the complaint be dismissed, and that judgment enter for the Plaintiffs and against the Defendant Cherry Creek School District No. 5 on the counter-claim insofar as the same seeks money damages. Each of the parties hereto shall pay his, her, or its own costs. Any party may have ten days in which to file a motion for new trial, and the Court dispenses with oral argument on such motions.

DONE in open Court this 2nd day of September, 1965.

BY THE COURT:

s/ Marvin W. Foote

Judge

APPENDIX C-1

Provisions of 14th Amendment (Constitution of the United States) involved.

"Section 1: 'All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. *No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of* life, liberty, or *property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*'" (Emphasis added.)

APPENDIX C-2

Colorado Revised Statutes, 1963, Section 139-10-8.

"Landowner defined.—For the purpose of this article 'landowners,' as used in section 139-10-3, shall mean owners in fee of real property in the territory proposed to be annexed who have in the next preceding calendar year become liable for a property tax thereon; etc."

APPENDIX C-3

Additional Section of Colorado Revised Statutes, Section 139-10-8, as adopted in Session Laws of 1957 (then numbered as Colorado Revised Statutes, 1953, Section 139-11-8).

"Section 2.—Safety Clause—The General Assembly hereby finds, determines and declares that this act *is necessary for the immediate preservation of the public peace, health and safety.*" (Emphasis added.)

APPENDIX C-4

Colorado Revised Statutes, 1963, Section 139-10-3(1).

"Proceedings initiated — when complete. — (1) Pro-

ceedings for annexation of territory eligible as defined in section 139-10-2 shall be initiated by a written petition presented to the legislative body of the city, city and county or incorporated town to which it is proposed to annex such territory, signed by the *owners* of more than fifty per cent of the area of such territory who shall also comprise a majority of the *landowners* residing in the territory at the time the petition is filed. Etc." (Emphasis added.)

APPENDIX C-5

Colorado Revised Statutes, 1963, Section 139-10-4(2).

"Proceedings for an election to determine the question of annexation shall be initiated by a written counter-petition filed with the clerk of the legislative body of the city, city and county, or incorporated town to which it is proposed to annex such territory within thirty days of the date of the first date of publication of notice of the petition seeking annexation, *executed by persons who would have been qualified to sign the petition for annexation* in a number of not less than two thirds of the number of signatures on that petition and signers of that petition may sign this counter-petition. The provisions of section 139-10-3 concerning the preparation of the petition shall apply likewise to the counterpetition." (Emphasis added.)

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 998

CLYDE B. ROGERS, BETTY J. ROGERS, JOHN L. LEMSTER, and as a class, all persons similarly situated, and THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF ARAPAHOE, *Appellants*,

v.

THE CITY AND COUNTY OF DENVER, a municipal corporation; and THE CHERRY CREEK SCHOOL DISTRICT No. 5 IN THE COUNTY OF ARAPAHOE AND STATE OF COLORADO, *Appellees*.

ON APPEAL FROM THE SUPREME COURT OF COLORADO

MOTION TO DISMISS

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MOTION TO DISMISS

Appellees, City and County of Denver, State of Colorado and The Cherry Creek School District No. 5 move to dismiss the appeal herein pursuant to Rule 16 of the Revised Rules of this Court, upon the ground that no substantial federal question is involved herein.

Question Presented

Whether Denver is proscribed by the due process and equal protection clauses of the 14th Amendment to the United States Constitution from accepting as provided by Colorado law, a voluntary annexation petition from landowners of a tract of land under annexation provisions which have been upheld by the Colorado Supreme Court because it refused an election requested by nonqualified landowners.

Statement of the Case

Annexation in Colorado is initiated on a voluntary basis by landowners in the area seeking annexation. A written petition signed by the owners of more than fifty percent of the area seeking annexation who shall also comprise a majority of the landowners residing in the territory at the time the petition is filed must be presented to the legislative body of the city, city and county or incorporated town to which annexation is sought. (Colorado Revised Statutes, 1963, Section 139-10-3)

Landowners are defined as ". . . owners in fee of real property in the territory proposed to be annexed who have in the next preceding calendar year become liable for a property tax thereon; . . .". (C.R.S., 1963, 139-10-8)

An election is required if a written counter-petition is filed with the municipality to which the territory is pro-

posed to be annexed. Such counter-petition must be filed within thirty days of the first publication of notice of the petition seeking annexation and must be executed by persons who would have been qualified to sign the petition for annexation, in a number of not less than two thirds of the number of signatures on the petition. Signers of the petition may also sign the counter-petition (C.R.S., 1963, 139-10-4(2).

On December 31, 1964, owners of land in Arapahoe County, Colorado, contiguous to the City and County of Denver, an area eligible for annexation, applied to the City Council of the City and County of Denver for annexation.

Appellant Rogers and others similarly situated thereafter signed a counter-petition. The counter-petition was rejected by the City Council of Denver because it did not include the required number of signatures. The signatures of Appellant Rogers, and others similarly situated, were rejected by the city council because they did not possess the statutory requirement of being "a landowner". Appellants had not been "owners in fee of real property in the territory proposed to be annexed who have in the next preceding calendar year (to the date of the Petition, i.e. 1963) become liable for a property tax thereon."

The City Council of the City and County of Denver thereafter, pursuant to the statutory procedure, passed an ordinance of annexation whereby the property proposed by the landowners for annexation was annexed to the City and County of Denver. (Ordinance No. 57, Series 1965, effective March 20, 1965)

Appellants did not and do not challenge the regularity and validity of the annexation procedure. Indeed Appellants admit that all the annexation procedures and standards provided by Colorado Revised Statutes, 1963, Sections 139-10-1 et seq. have been fully complied with and adhered

to by both the petitioners for annexation and the City and County of Denver (R. 52-55). Appellants challenge the annexation on the sole basis that their counter-petition should have forced an election and that the statutory definition of "landowners", with which they did not comply, is "unreasonably arbitrary" and constitutes "discriminatory classification" in violation of the due process and equal protection clauses of the United States Constitution.

The Supreme Court of Colorado, En Banc, in a unanimous opinion affirmed the Judgment of the District Court In And For the County of Arapahoe, and held the annexation valid. In holding that there was no violation of Appellants' rights under the Constitution of the State of Colorado and that the definitions in the statute are a matter for determination by the Colorado General Assembly and that they are not unreasonably arbitrary or discriminatory, the Court affirmed past precedent in Colorado and the principle that "in the absence of express constitutional provisions to the contrary, the power of a state legislature over the boundaries of the municipalities of the state is plenary." (419 P. 2d 648, 649)

ARGUMENT

No Substantial Federal Question Is Raised By This Appeal.

1. *Annexation Procedure A Matter Of State Law.*

This Court has consistently recognized the plenary power of the state to expand or contract the territorial area of its political subdivisions. This Court in *Hunter* v. *Pittsburgh* 207 U.S. 161, 179, held:

> "All this may be done, conditionally or unconditionally, with or without the consent of the citizens, or even against their protest. In all these respects the State

is supreme and its legislative body, conforming its action to the state constitution, may do as it will, unrestrained by any provision of the Constitution of the United States. Although the inhabitants and property owners may by such changes suffer inconvenience, and their property may be lessened in value by the burden of increased taxation, or for any other reason, they have no right by contract or otherwise in the unaltered or continued existence of the corporation or its powers, and there is nothing in the Federal Constitution which protects them from these injurious consequences. The power is in the State and those who legislate for the State are alone responsible for any unjust or oppressive exercise of it."

2. *Appellants Concede Annexation According To State Law.*

Appellants herein concede, as indeed they must, that the annexation procedure and standards provided by Colorado Revised Statutes, 1963, Sections 139-10-1 et seq. have been fully complied with by both the petitioners for annexation and the City and County of Denver. (R. 52-55). Appellants further concede that the annexation procedure is not "merely unconstitutional, improvident or an abuse of discretion by the Legislature" (Jurisdictional Statement p. 7). Appellants' only challenge is that the legislation upon its merits represents an unconstitutional deprivation of guaranteed rights against unreasonably arbitrary and discriminatory classifications, an invidious discrimination. Such a challenge made in a vacuum and without specificity is without merit and raises no federal question. *Hunter* v. *Pittsburgh*, 207 U.S. 161, 179; *Kelly* v. *Pittsburgh*, 104 U.S. 78, 80, 81; and see other cases cited at 207 U.S. 178.

In 1893, the Colorado Supreme Court in *Mayor* v. *Shat-*

tuck, 19 Colo. 104, 34 Pac. 947, 949 (1893) held that the legislature has plenary power over municipal corporations. In so holding, the Court upheld a legislative classification as presented here, restricting annexation elections to "tax paying electors" as opposed to electors who paid no real property tax. The Court said (Id. at 950) "In the absence of any specific constitutional provision to the contrary, the legislature may choose any appropriate agency whereby to change, modify or disincorporate municipal corporations", and added "We find nowhere in the constitution any provision forbidding the submission of the question of dissolution or annexation to the determination of tax-paying electors". This construction of a state constitution is binding upon this Court. *Jefferson Branch Bank* v. *Shelly*, 1 Black (U.S.) 436, 443; *Morehead* v. *New York*, 298 U.S. 587, 609; *Erie Railroad Co.* v. *Tompkins*, 304 U.S. 64, 71.

3. *Classification Not Arbitrary Or Unreasonable.*

The Colorado Supreme Court has for some seventy years considered that the people themselves had the right to set up a separate classification restricting annexation elections to "tax paying electors." *Mayor* v. *Shattuck*, 19 Colo. 104, 34 Pac. 947, 950 (1893).

It has long been settled that a classification, even though discriminatory is not arbitrary or violative of the Equal Protection Clause if any state of facts reasonably can be conceived that would sustain it. *Allied Stores* v. *Bowers*, 358 U.S. 522, 528. The limitation on the rights of individuals to question legislative action in judicial proceedings where standing is predicated on the status of taxpayer has long been recognized. *Massachusetts* v. *Mellon*, 262 U.S. 447, 487.

As stated by the Colorado Supreme Court, (Jurisdictional Statement 13)

"Inasmuch as the legislature may provide for the annexation of territory to municipal corporations without the consent of the annexed territory, the inhabitants cannot complain of any limitations upon their ability to express their disapproval if the legislature sees fit to make the statute conditional upon its acceptance by the affected territory."

The Supreme Court of Alaska passing upon a similar problem in *Fairview Public Utility District* v. *City of Anchorage*, 368 P. 2d 540, 546 (Alaska 1962), appeal dismissed and cert. denied, 371 U.S. 5, stated:

> "Those who reside or own property in the area to be annexed have no vested right to insist that annexation take place only with their consent. The subject of expansion of municipal boundaries is legitimately the concern of the state as a whole, and not just the local community. There has been no infringement or deprivation of rights protected by the Fourteenth Amendment."

Appellants cite no relevant case [1] nor do they allege any specific discrimination other than the fact that they were not qualified as "landowners" to compel an election on the annexation. The Colorado Supreme Court, found no such right vested in Appellants by either the laws of Colorado or the Constitution of the United States.

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[1] *Gomillion* v. *Lightfoot*, 364 U.S. 339, involved changing boundaries, race discrimination and the Fifteenth Amendment; *Munn* v. *Illinois*, 94 U.S. 113, upheld the establishment of charges for the storage of grain; *Lucas* v. *Forty Fourth General Assembly*, 377 U.S. 713, involved apportionment of the Colorado Legislature; *Eubank* v. *Richmond*, 226 U.S. 137, an unreasonable exercise of the municipal police power for establishing building lines; *McCabe* v. *Atcheson*, etc. R. Co., 235 U.S. 151, involved the Oklahoma "separate coach law"; and *In re Oregon Tunnel Dist. No. 1*, 253 Pac. 1 (Oreg. 1927) involved a local improvement district for benefit taxation which excluded landowners holding less than 5,000 sq. ft. of property from voting but not from the tax burdens.

4. Arapahoe County, And Its Officials, Have No Fourteenth Amendment Rights They Can Maintain Against The State of Colorado.

The Complaint in this case by the Board of County Commissioners Of the County Of Arapahoe against the exercise of political power by the State of Colorado, through its Constitution and a properly adopted statute, is plainly without merit.

The Supreme Court of Colorado has held that counties are merely subdivisions of the State and their powers are limited to those specifically granted by the State. *Colburn* v. *Board of County Commisioners of El Paso County,* 15 Colo. App. 90, 61 Pac. 241, 243 (1900).

The rights exercised over the area within its boundaries by the county are political rights—also the power is a political power. Neither the county nor the inhabitants of the county possess vested property rights in the county system, in the county government, or in the county boundaries, nor a right to live in any particular county of the state. The right here is not a vested property right of a person against his government which is protected by the Constitution of the United States. A political right conferred by law upon a subdivision of the state is not a vested right against the government, which, in this case, because it involves the state Constitution, is the people themselves.

The equal protection clause was not designed to insulate state instrumentalities, such as counties, from state action, and as counties they do not have privileges or immunities which they may invoke contrary to the will of their creator. "A municipal corporation, created by a state for better ordering of government, has no privileges or immunities under the federal constitution which it may invoke in op-

position to the will of its creator." *Williams* v. *Baltimore*, 289 U.S. 36, 40; see also *Hunter* v. *Pittsburgh*, 207 U.S. 161. As this Court long ago held in *Laramie County* v. *Albany County*, 92 U.S. 307, 311, political subdivisions of a state cannot sustain their privileges or even their existence upon the basis of any contract with the state. Nor do they have any contract rights with the state solely by reason of their relationship to it. *Gomillion* v. *Lightfoot*, 364 U.S. 339, 343. "... [T]he Equal Protection Clause relates to equality between persons as such, rather than between areas" and "territorial uniformity is not a constitutional requisite." *McGowan* v. *Maryland*, 366 U.S. 420, 427. Nor do the Appellants as individuals have any contract right to the continued maintenance of their county or its powers in unaltered form. *Hunter* v. *Pittsburgh, supra.*

Conclusion

For the foregoing reasons, the appeal should be dismissed as no substantial federal question is presented herein.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1966

No. 998

CLYDE B. ROGERS, BETTY J. ROGERS, JOHN L. LEMSTER, and as a class, all persons similarly situated, and THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF ARAPAHOE,

Appellants,

vs.

THE CITY AND COUNTY OF DENVER, a municipal corporation; and THE CHERRY CREEK SCHOOL DISTRICT NO. 5 in the County of Arapahoe and State of Colorado,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF COLORADO

BRIEF IN OPPOSITION TO MOTION TO DISMISS

Appellees' framing of the "Question Presented" strays far from the basis of Appellants' contention, which is that the classification of "landowners" who are entitled to petition or counterpetition to force annexation elections creates an arbitrary and invidious discrimination with no rational basis in law or fact. (Jurisdictional Statement, p. 3.)

Appellants concede that the laws of the State of Colorado were followed in the annexation proceeding questioned herein and even that the State may exercise plenary power over annexations; but Appellants concede the latter point only if the exercise of that power by the State remains within constitutional bounds. Appellants steadfastly deny the right of the State to exercise any power in a manner which deprives citizens of constitutionally protected rights be they State or Federal.

Appellants deny any allegations of unconstitutionality made in a "vacuum and without specificity." On the contrary a specific set of facts and specific claims of deprivation of rights and invidious discrimination have been made. (Jurisdictional Statement pp. 3-6.)

In *Kelly v. Pittsburgh,* 104 U.S. 78, cited by Appellees, Kelly raised no objection to annexation, but only to the imposition of taxes on his farm property, which taxes were to be used for general city purposes. This Court in that case pointed out the advantages to Kelly's property and held that the tax was for a public purpose and therefore valid. It was also held that the tax, if excessive, could not be modified by the Court.

In the instant case excessive or unconstitutional use of taxes is *not* at issue. The issue here is the constitutionality of the definition of "Landowners" in Colorado Revised Statutes, 1963, Chapter 139-10-8, and whether such definition creates an unconstitutionally arbitrary classification and invidious discrimination violative of Appellants' rights to due process and equal protection of the law.

Appellees' cite *Mayor v. Shattuck,* 19 Colo. 104, 34 Pac. 947, 950 (1893) somewhat out of context. The Colorado Supreme Court, at the point cited, merely stated that: "We find nowhere in the constitution any provision forbidding the submission of the question of dissolution or annexation to the determination of taxpaying electors." 19 Colo. at 112, 34 Pac. at 950. This is not inconsistent with Appellants'

claim that if the annexation is, by legislative enactment, to be submitted to the taxpaying electors, the classification of "taxpaying electors" may not be arbitrary and discriminatory. Whether this Court is bound by the decision of the Colorado Supreme Court that the Legislature may choose any *appropriate* agency (in the context of manner or means of accomplishment) to "change, modify or disincorporate," is academic since Appellants admit the right of the Legislature to do so. It is the *appropriateness* of the manner which is herein challenged as depriving Appellants of equal protection and due process of law.

It may well be that a classification is not arbitrary or violative of constitutional safeguards if a state of facts to sustain it can be reasonably conceived, however, neither Appellees nor the Courts below have brought forth any such conception with which to fortify their position. There is no state of facts which can rationalize the invidious discrimination which arises from allowing the man who bought his house December 31 of the year prior to the raising of a petition for annexation to vote and disenfranchising the man who completed his purchase the following day, or, in the instant case, as much as 364 days later.

The *Mellon* case (*Massachusetts v. Mellon*, 262 U.S. 447 [1922]), cited by Appellees, applies only to taxpayers attempting to attack a Federal appropriation on the grounds it would increase the taxpayers taxes. The Supreme Court in that case, in fact, pointed out that the interest of a taxpayer of a municipality is direct and immediate. 262 U.S. at 486. Further, Appellants herein do not base their standing on the fact that they are taxpayers in the area annexed, but that they are "aggrieved" persons under the Colorado Statutes (C.R.S. 1963, § 139-10-6), with respect to their constitutional rights [a fact to which Appellees stipulated in paragraph 1 of the written stipulation presented to the trial court and which is part of the Record].

The *Fairview Public Utility District v. City of Anchorage* case, (368 P.2d 540, Alaska [1962]), is inappropriately

cited by the Appellees since the Colorado Legislature has already decided the issue of whether a vote will be allowed. The question is not whether property owners have the right to vote, but whether property owners, *once the right to vote is granted*, may be divided into classes resulting in an invidious discrimination as to a substantial portion of them. The Alaska annexation procedure as set forth in its Constitution and Statutes is wholly different from that of the State of Colorado and no comparison of the case law of the two States can validly be made in this case.

The County of Arapahoe may sue as a "person aggrieved" in annexation under the laws of the State of Colorado. See C.R.S. 1963, § 139-10-6, and *City and County of Denver v. Miller*, (151 Colo. 444, 379 P.2d 169, 174 [1963]) and may therefore maintain an appeal from an adverse decision of the courts below.

WHEREFORE, Appellants show this Honorable Court that they are not barred from asserting the issues raised on appeal and more fully set forth in the Jurisdictional Statement, which issues are valid, are substantial, and should be reviewed by this Honorable Court, especially in the light of changes in urban and suburban concepts since 1907 and the lack of clear guidelines in the subject matter of this case since the now seemingly outdated *Hunter* decision.

Respectfully submitted,
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Attorney for Appellants

CERTIFICATE OF SERVICE

I, HARRY L. ARKIN, of Denver, Colorado, being a member of the bar of the Supreme Court of the United States, hereby certify that I have served the foregoing Brief In Opposition To Motion To Dismiss upon The City

and County of Denver, being the only adverse party involved herein, by depositing a true and correct copy thereof in a United States post office mail box with first class postage prepaid, addressed to its counsel of record, Max P. Zall, City Attorney, and Thomas G. Roche, Assistant City Attorney, City and County of Denver, 353 City and County Building, Denver, Colorado 80202, and by depositing two true and correct copies of said Brief in a United States post office mail box with first class postage prepaid, addressed to its counsel of record, Charles S. Rhyne, Brice W. Rhyne, Alfred J. Tighe, Jr., Rhyne & Rhyne, 400 Hill Building, Washington, D.C. 20006, on this 7th day of March, 1967.

HARRY L. ARKIN

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1966

No. 998

CLYDE B. ROGERS, BETTY J. ROGERS, JOHN L. LEMSTER, and as a class, all persons similarly situated; and THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF ARAPAHOE,

Appellants,

vs.

THE CITY AND COUNTY OF DENVER, a municipal corporation; and THE CHERRY CREEK SCHOOL DISTRICT NO. 5 in the County of Arapahoe and State of Colorado,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF COLORADO

MOTION FOR REHEARING

This Honorable Court, on March 27, 1967, entered its Per Curiam Order granting Appellees' Motion to Dismiss "for want of a substantial federal question."

Appellants herein move that this Honorable Court grant a rehearing of this matter and respectfully submit, without knowing the underlying premise of the Court's Order, that perhaps the Court may not have fully realized the potential implications of its decision.

If, by its Order, the Court is apparently indicating that *Hunter v. Pittsburgh*, 207 U. S. 161 (1907) is dispositive of the instant case, the end result is that a state, in setting up annexation procedures, may allow some property owners to vote and disregard the rights of others, disenfranchising the latter by an invidious discrimination, setting up a baseless classification. The opinion in the *Hunter* case is not a logical foundation for such a result. The ratio decedendi of the *Hunter* case was that the annexation procedure set up, by giving the right to vote to members of the same class in each of the two communities involved, was not violative of any rights, although the voters in Pittsburgh could by weight of numbers overwhelm any opposition in the City of Allegheny.

In the instant case, Appellants contend that the right to vote has not been granted equally to all property owners in the affected area and this inequality constitutes a deprivation of constitutional rights and, therefore, presents a substantial federal question.

The issue here is of effect not only to the citizens of the county involved in the instant case, but to every political subdivision of every state throughout the United States. Some sixty years have elapsed since the opinion of this Honorable Court in *Hunter v. Pittsburgh* and substantial changes have occurred in the patterns of American urban living in the interim. The suburban concept was not conceived as we understand it today at the time of *Hunter*. At that time this Honorable Court had not thought it necessary or proper to consider matters until recently thought within the sole province of the states, such as the question of proportionate representation in state legislative bodies. It is equally significant and necessary that this Court examine other fundamental rights once believed to be beyond the scope of the protection of the Federal Constitution.

In the instant case, continued invasions by the City and County of Denver may ultimately result in a dissolution of the suburban county as an effective political subdivision, based upon the challenged statutes which in-

vidiously discriminate between real parties in interest who reside in the geographic area concerned as to which of them may or may not petition for or against annexation. The voice of those allowed no vote in the question of annexation will also become less significant in other levels of the governmental process as well, without their being granted the right of protest to the arbitrary action authorized by statutes beyond the pale of due process and equal protection.

A further direct result of this Court's failure to review the instant case is to dilute the one-man one-vote concept expressed in *Lucas v. Forty-Fourth Gen. Assem. of Colo.*, 377 U.S. 713 (1964) at both the state and federal levels. Continued annexations, under the inequitable annexation procedures described in this case, will inevitably result in unequal representation in the legislative branches of government. The City and County of Denver constitutes one congressional district, while the County of Arapahoe, of which the subject area has been a part, is included within a different congressional district. The constituencies of Reps. Byron Rogers and Donald Brotzman may be continually enlarged and depleted without corresponding changes in the Congressional Districts, thereby disrupting the voting balance required by the *Lucas* doctrine.

Appellants respectfully point out that neither the trial court nor the Colorado Supreme Court resolved Appellants' claims of deprivation of Federal Constitutional rights. As this Court stated in the *Lucas* case at page 736, "Courts sit to adjudicate controversies involving alleged denials of constitutional rights." By ignoring Appellants' claims of such denials, the lower courts were derelict in their duty to the Appellants herein.

This Court's language in *Lucas*, at pp. 736, 737, quoting *West Virginia State Board of Educ. v. Barnette*, 319 U.S. 624, 638, 63 S.Ct. 1178, 1185, 87 L. Ed. 1628,

> "One's right to life, liberty, and property *** and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections. A citizen's con-

stitutional rights can hardly be infringed simply because a majority of the people choose that it be."

Changing "vote" and "elections" in the foregoing quotation to "legislative action", the principal is the same. State legislatures by their actions cannot deprive citizens of federally protected constitutional rights.

WHEREFORE, the classification set up by the Colorado Legislature having no rational basis in law or fact, the Appellants have been deprived of property without due process and equal protection of law and such deprivation does in fact raise a substantial federal question.

Respectfully submitted,
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Denver, Colorado 80202
Attorney for Appellants

CERTIFICATE OF COUNSEL

COMES NOW HARRY L. ARKIN, counsel for Appellants, and hereby certify that I have carefully examined the Order of the Court granting the Motion To Dismiss in the above and foregoing case and from such examination I have prepared the above and foregoing Motion For Rehearing is hereby presented in good faith and not for delay.

HARRY L. ARKIN

CERTIFICATE OF SERVICE

I, HARRY L. ARKIN, of Denver, Colorado, being a member of the bar of the Supreme Court of the United States, hereby certify that I have served the foregoing Motion For Rehearing upon The City and County of Denver, being the only adverse party involved herein, by depositing a true and correct copy thereof in a United States

post office mail box with first class postage prepaid, addressed to its counsel of record, Max P. Zall, City Attorney, and Thomas G. Roche, Assistant City Attorney, City and County of Denver, 353 City and County Building, Denver, Colorado 80202, and by depositing two true and correct copies of said Motion For Rehearing in a United States post office mail box with first class postage prepaid, addresesd to its counsel of record, Charles S. Rhyne, Brice W. Rhyne, Alfred J. Tighe, Jr., Rhyne & Rhyne, 400 Hill Building, Washington, D.C. 20006, on this 14th day of April, 1967.

HARRY L. ARKIN

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966.

ROGERS ET AL. *v.* CITY AND COUNTY OF DENVER ET AL.

APPEAL FROM THE SUPREME COURT OF COLORADO.

No. 998. Decided March 27, 1967.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.